

**2005 ENVIRONMENTAL NEGOTIATIONS COMPETITION**  
**CONFIDENTIAL INSTRUCTIONS FOR SAN TOPE COUNTY D.A.**

**ROUND 1** (You are the attorney representing the DA in the negotiations)

As a legal matter the DA has a strong case, and she knows it. She can substantiate the alleged violations. As a practical matter, she has concerns. It is unclear how penalties will be calculated for various violations, including the cutting of the trees. The potential size of any penalty will be substantially affected by whether a court accepted the argument that a per tree penalty should be assessed or if it holds that there should be a penalty assessed for each day *Mujera Blanca* left sediment piles in the open. It is also unclear whether the court will limit restitutionary awards and disgorgement, following *Kraus* and *Korea Supply*, where the DA, rather than a private party, is the plaintiff. The DA, therefore, will trade off some penalties for significant restoration and monitoring.

Items 1 and 3. Creek, Wetlands, and Forest Restoration and Penalty/Disgorgement.

Total Settlement Amount: In order to resolve the whole case, the DA wants a minimum of \$6 million committed to restoration, penalties and disgorgement, while she would prefer substantially more.

She wants at least \$500,000 in penalty and at least \$5 million for restoration.

Restoration. The exact details of the restoration are not that important to the DA, while some of the details, at least, are important to Gregory. You should use Gregory's interest in specific details to increase the value of the restoration you can obtain. At a minimum,

a) the almost-completed wetlands project must be completed. In addition, the DA seeks restoration of at least another 2 acres. The DA's consultant estimates this to be worth \$1 million. The 2 additional acres can be restored in two different places adjacent to the on-going wetlands restoration, and those areas have the potential be expanded from 2 to as much as 5 acres in either area. The DA knows that Gregory has a strong preference for the northern, as opposed to southern, of the two areas because he has some plans for future development on the southern area. Gregory's preferred area is somewhat less beneficial from a biological perspective. The DA will accede to Gregory's preference if she can get more restoration or penalties.

b) Gregory must agree to fund the US Forest Service's re-planting work for at least 3000 trees, which costs \$500,000 per 1000 trees. Gregory does not want any of the reforestation to take place on the ski resort. The DA knows that the US Forest Service has primary control over that decision, so she can agree that she will not require that the reforestation take place on the ski resort. While the minimum you will accept is 3000 trees, you should try and increase the amount of reforestation work that Gregory will fund beyond that number.

c) Gregory must also install sediment controls for the 2 miles of the creek estimated to have been impacted, at a consultant-estimated cost of \$500,000 per mile. The more work Gregory agrees to do, the better. Work could be done for up to ten miles of the creek.

## 2. Monitoring and Compliance

This is the tougher issue. The DA wants three items:

a) funding by Gregory for ½ full time position for a county inspector, at \$60,000, for a period of at least two years.

b) a scheme of liquidated damages for all permit violations, from \$1000 to \$10,000 per violation.

c) a semi-annual statement of compliance, signed by Magnani and Gregory under penalty of perjury.

The DA is willing to negotiate away the ½ position funding because she can fund it out of the penalty recovery. She will agree to a maximum liquidated amount of \$5000, and she will agree to limit the types of violations subject to liquidated penalties. The list can be subject to negotiations at a later time. The compliance statement can be annual.

On behalf of the DA, you should be prepared to make the initial proposal to set the negotiation in motion. Your proposal should include something for each of the identified issues.